IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21806

STEVEN MICHAEL OSHATZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

J. B. Tietz
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Appellant

E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Table of Cases

STATUTES AND OTHER AUTHORITIES

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21806

STEVEN MICHAEL OSHATZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the (old) Southern District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App. Section 462 (knowingly fail and refuse to be inducted into the Armed Forces of the United States), Universal Military Training and Service Act [CT 6].[1]

1. CT refers to Clerk's Transcript.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [CT 7].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT 2].

Appellant pleaded "not guilty" and was tried by the Honorable Jesse W. Curtis, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [CT 6].

A written motion for judgment of acquittal was filed during the trial [CT 4].

FACTS

The pertinent facts of this appeal are:

Appellant timely filed an SSS Form No. 150, Special Form for Conscientious Objector. [Ex.* 35-44].

In it he made out every element of a prima facie case.

[If any controversy arises on the above two statements we will deal with the matter in our Closing Brief].

*Ex. refers to the Government's Exhibit, the complete Selective Service System file of defendant.

Appellant sent several character-reference letters to the local board to support his claim. [Ex. 47-60, 62].

The local board sent him an invitation "to present yourself for an interview on February 1, 1966." [Ex. 61].

An account of this interview, made by a board employee [Ex. 64-66] shows, we will argue (1) a pre-occupation on the part of the board members with illegal bases for decision and (2) an illegal refusal to "reopen" appellant's classification.

He was ordered to report for induction on March 22, 1966. He did report but refused to submit to induction. It is demonstrable that, during the proceedings immediately prior to being called on to submit to induction he was not given the mandatory opportunity to execute DD Form 98, or refuse to do so. [Ex. 73 (a)].

QUESTIONS PRESENTED

I

Was a denial of a deferred classification to appellant, by the Selective Service System, without basis in fact, arbitrary and contrary to law? This was raised by the Motion for Judgment of Acquittal.

II

Was the appellant given a fair or a proper hearing by his local board? This question was also raised by the motion.

III

Was the appellant properly processed at the induction station by the proceedings accorded him? This question was also raised by the motion.

SPECIFICATION OF ERROR

I

The District Court erred in denying the Motion for Judgment of Acquittal.

SUMMARY OF ARGUMENT

I

Appellant made out a prima facie case as a conscientious objector. The task of the court is to search the record for some affirmative evidence to support the local board's denial of I-O classification to appellant. The record in this case is barren of any such evidence.

II

The evidence in the record shows he was not given a fair hearing by the board members, nor a proper one.

III

The unrebutted evidence in the record shows that the induction ceremony was contrary to law and prejudicial to appellant.

ARGUMENT

I

The Denial of a Conscientious Objector Classification by the Selective Service System Was Without Basis in Fact, Arbitrary, Capricious and Contrary to Law.

Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended [50 U.S.C. App. 456 (j)], provides:

> "Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . ."

Section 1622.14 (A) of the Selective Service Regulations [32 C.F.R. 1622.14 (A)] provides:

> "1622.14 Class I-O: Conscientious Objector Available for Civilian Work, Contributing to the Maintenance of the National Health, Safety or Interest.—(A) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The local board's duties and the courts' scope of review in draft cases were spelled out by the United States Supreme Court in *Dickinson* v. *United States,* 74 S.Ct. 152, 157, 158, 346 U.S. 389 (1953):

"The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply the test of 'substantial evidence'. However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."

". . . when the uncontroverted evidence supporting the registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The dissenting opinion of Mr. Justice Jackson states the teachings even more explicitly (74 S.Ct. 152, 159):

"Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ."

In the present instance appellant made out a prima facie case for a I-O classification when he asked for and then filed with the local board his Form 150 in which he claimed conscientious objection to war in any form based upon religious training and belief.

The government's case (the appellant's Selective Service file placed in evidence as the government's exhibit) is totally barren of any evidence whatsoever tending to cast

the slightest doubt on appellant's sincerity or truthfulness, or that he hasn't presented a correct picture.

Thus the local board's denial of I-O classification to appellant and classifying him in Class I-A was without basis in fact and upholding that arbitrary classification would be contrary to the rule of law as set forth in *Dickinson*.

II

Appellant Was Not Given a Fair Hearing, or a Proper One.

A. The hearing was unfair [Ex. 64-66].

If the local board had not decided that the hearing was to be "an interview" and thus indicating their intention to not permit their registrant to have an administrative appeal [there is no appeal from an adverse decision resulting from an interview] the following facts might not be fatal to the fairness of the hearing. As it is, a preoccupation with erroneous standards, that is, ones not set up by the act or the regulations, and ones declared erroneous by the courts, makes such a hearing a travesty.

At this interview it was initially determined that the registrant had been brought up by his parents "with Hebrew School and Temple". This is wholly sufficient for the "religious training" required by Congress. See *In re Nissen*, (D. Mass. 1956) 146 F.Supp. 361, 363. Then, this unnecessary dialog [Ex. 64] followed:

"Luppen: Were you Bar Mitzvah?

Registrant: No.

Luppen: You are not a member of the Jewish Faith at this time?

Registrant: I did not accept the Jewish Faith.

Luppen: To clarify, you are not a member of the Jewish Faith?

Registrant: No."

The Second Circuit in *Jakobson* v. *United States,* 325 F.2d 409 (2 Cir., No. 28137), posed its problem:

> "If we were certain that the denial of exemption rested on a finding of insincerity, Jakobson's five year delay in claiming conscientious objection and his shift of position after making the claim would oblige us to affirm his conviction." [412].

But it decided:

> "On the other hand, if the Appeal Board, although believing Jakobson to be sincere, based its classification on the ground that his conscientious objection was not the result of religious training and belief, we would be compelled to reverse the conviction and direct dismissal of the indictment. For we rule it an erroneous construction of the statute to conclude that Jakobson's beliefs fell outside its definition of religion." [412].

The core problem in *Jakobson, supra,* was similar to ours: were Jakobson's views on conscientious objection based on religious beliefs? The Second Circuit devoted much of its opinion in *Jakobson* to an analysis of the evidence in the light of the latest Supreme Court decisions defining religious belief.

The thrust of the Supreme Court's decisions defining religion has also been analysed by legal writers, such as

law professor Francis J. Conklin, S.J., writing in the Georgetown Law Journal [1963, v. 51, p. 252], as follows:

> "It is now evident that the line of reasoning followed by Judge Hand in Kauten* has been adopted by the Supreme Court as the current interpretation of the meaning of the word 'religion' in the first amendment. In Torcaso v. Watkins[112] the Supreme Court, in holding that the Maryland religious test for public office which required a declaration of belief in the existence of God was an unconstitutional invasion of appellant's freedom of belief and religion, all but explicitly declared that the 'Supreme Being Clause' of the Selective Service Act is now unconstitutional. The opinion of the Court, authored by Mr. Justice Black, clearly demonstrates that the 'Supreme Being Clause' is repugnant to the first amendment since it aids 'all religions as against non-believers,' and aids some 'religions based on a belief in the existence of God as against those religions founded on different beliefs.' "[113] [276].

Illegal standards relied upon by an administrative officer that become a part of the draft board file have many times been relied upon for the reversal of convictions. See *Annett* v. *United States,* 205 F.2d 689 (10th Cir., 1953); *Sicurella* v. *United States,* 348 U.S. 385 (1955); *Taffs* v. *United States,* 208 F.2d 329 (8th Cir., 1953).

Our point, that a situation like this requires reversal of a conviction, was stated by this Court in *Affeldt* v. *United States,* 9 Cir., 1954, 218 F.2d 112 at 115.

Kauten v. *Downer,* (U.S. ex rel.) 2 Cir., 1943, 133 F.2d 733.

In addition to *Affeldt, supra,* this Court has condemned a determination where it appeared that "the appeal board may have accepted the erroneous advice of the Department of Justice * * *". See *United States* v. *Batelaan,* 9 Cir., 1954, 217 F.2d 946, last paragraph. Other courts have followed this salutary principle in criminal cases, and one not citing *Batelaan* or *Affeldt* is *United States* v. *Erikson,* S.D. N.Y. 1957, 149 F.Supp. 576. Cf. *MacMurray* v. *United States,* 9 Cir., 230 F.2d 928.

This sub-point (of "imported" standards) will not be belabored for the next, we submit is determinative.

B. The hearing was not a proper one.

It should have been held as an "Appearance Before Local Board." This would have given the registrant the right to ask for an administrative appeal. Such a method of handling this problem he presented was wrong and this Court has so declared. The latest appellate decision on this subject is *Miller* v. *United States,* 9 Cir., December 29, 1967, ... F.2d .....

III

The Induction Ceremony Point

Appellant was not properly processed on the "loyalty" portion of the induction proceedings.

The facts are *demonstrated* by the government's own evidence [Ex. 73 (a)]. It states that appellant "was not given DD Form 98 to initiate."

The pertinent part of the Selective Service System Regulation (32 C.F.R.) provides:

"1632.16 INDUCTION:—At the induction station the selected men who have been forwarded for induction *and found qualified* will be inducted into the Armed Forces." (Emphasis supplied).

Since there are no System regulations on induction proceedings the Army regulations govern. *Chernekoff* v. *United States,* 9 Cir., 1955, 219 F.2d 721, 724, n. 12.

The pertinent Army regulation is:

AR 601-270 "Personnel Procurement, Armed Forces Examining and Entrance Stations", provides in its pertinent part:

"80. DD Form 98 (Armed Forces Security Questionnaire). A. Preparation: At the completion of the pre-induction examinations all registrants, except registrants in Class I-O (conscientious objectors), who are found to be militarily qualified for service in the Armed Forces, including administrative acceptees, will be given the opportunity to accomplish the Armed Forces Security Questionnaire. DD Form 98 will not be accomplished by registrants otherwise disqualified for induction, and processing under AR 604-10 will not be undertaken for registrants who are otherwise disqualified for induction.

(1) A commissioned officer who is thoroughly conversant with the regulations and policies pertaining to the accomplishment of the Armed Forces Security Questionnaire (DD Form 98) will be designated to have direct control over the procedures and will present the orientation established for completing the form.

(2) Volunteers for immediate induction and previously qualified registrants being processed for induction, who have not accomplished the security

questionnaire, or whose security questionnaire is invalid, will be given the opportunity to accomplish the security questionnaire prior to induction.

(3) At the time registrants are given the opportunity to accomplish the security questionnaire, an orientation will be presented in a manner so as to insure all persons understand the importance of accomplishing the questionnaire. The orientation will consist of the informational material outlined in Appendix IV.

(4) Individuals who are about to accomplish DD Form 98 will be fully instructed as to the importance of the entries to be made in section IV and of affixing their signatures, and the reasons their cooperation in the accomplishment of the Armed Forces Security Questionnaire is an important step at the beginning of their military service.

(5) Each individual will be instructed and prepared to respond in accordance with his rights and understanding of the entries he is required to make. Coercion or persuasion will not be used.

(6) Following the orientation, each individual will be directed to carefully read the entire contents of the DD Form 98 and to answer all questions in section IV by writing 'Yes' or 'No' in the appropriate columns. All entries on the DD Form 98 will be in the individual's own handwriting except where use of typed entries is specified.

(7) Immediately following the completion of the DD Form 98, and affixing the signature by the declarant, a commissioned officer serving as the witnessing officer will affix his own signature. The practice of permitting DD Forms 98 to accumulate for later signature will be avoided. The witnessing officer may be any duly commissioned officer. It is not mandatory, however, it is preferable that

he be an officer who is on duty with the induction station. Registrants will not be required to sign blank DD Forms 98 to be filled in at a later date by station personnel. This practice negates the value of DD Form 98 should the veracity of the statements therein be challenged. It also renders ineffective the penalty clause for falsification of the form.

(8) Security questionnaires are valid for a period of 120 days. If the time element between preinduction and induction is in excess of 120 days, the following statement will be placed in the Remarks Section of DD Form 98:

I have this date, ... reviewed the contents of DD Form 98 prepared by myself on ..... and certify that the statements then made by me are at this time full, true, and correct.

.....	.....
Signature of witnessing officer	Signature

The use of a rubber stamp and red ink is recommended for this requirement. An orientation in accordance with (3) above will be required for these individuals. An examinee who qualifies or refuses to accomplish this statement will be processed as for initial examinees of these categories.

b. Disposition.

(1) Security questionnaires which are satisfactorily accomplished by registrants will be forwarded to the appropriate Selective Service local board other records which pertain to the individual, or, when applicable, to the military installation of initial reception.

(2) **A registrant who qualifies or refuses to accomplish the DD Form 98 in its entirety (see AR 604-10) or who discloses significant derogatory information with respect to his background, or invokes constitutional privileges, and registrants admitting current membership in the Communist party ('known Communists') and registrants for whom credible derogatory information has been received from a reliable source indicating Communist party membership ('alleged Communists') as defined in AR 604-10, will not be inducted into the Armed Forces pending completion of a thorough investigation** (Bold type supplied).

(3) Investigative action as prescribed in AR 604-10 will be initiated at the induction station in all cases of registrants referred to in (2) above.

(4) If a registrant refuses to complete part of a DD Form 98 he will be requested to enter an explanation of the refusal in the remarks section and to sign the form. A commissioned officer serving as the witnessing officer will affix his own signature. If a registrant refuses to complete any part of a DD Form 98 and refuses to enter an explanation of the refusal in the remarks section and sign the form, the following statement will be entered in the remarks section of the form:

> (Registrant's name), a registrant, under the Universal Military Training and Service Act, was this date given an opportunity to execute DD Form 98 and in my presence he refused to do so.

This statement will be signed by a commissioned officer, and forwarded to the appropriate investigative agency in accordance with (3) above.

(5) DD Form 62 prepared for registrants referred to in (2) above will contain in remarks section the notation 'Acceptability for induction held in abey-

ance, not presently acceptable for induction.' No other notations will be made on the DD Form 62 and no other information or papers will be released to Selective Service local boards. Entries in regard to acceptability for induction will not be made.

(6) Item 22 on DD Form 47 pertaining to registrants referred to in (2) above will not be completed until the result of investigative action is received from higher headquarters.

(7) Entry on SSS Form 225 (Physical Examination List) for registrants for whom investigative action has been initiated in accordance with (3) above will indicate induction being held in abeyance. Same notation as required in (5) above will be entered.

(8) At the time final determination of the case under investigation has been made, the induction station concerned will be advised as to the appropriate action to be taken regarding the registrant whose induction is being held in abeyance. Upon receipt of information from higher headquarters indicating that registrants whose induction is being held in abeyance have been cleared for induction, the induction station will prepare a new DD Form 62 in its entirety and forward it to the appropriate Selective Service local board. Upon receipt of information from higher headquarters indicating that registrants whose acceptability is being held in abeyance have been determined to be unacceptable for induction, the induction station will prepare a new DD Form 62 and forward it to the appropriate Selective Service local board. Original and copy of DD Form 62 prepared in accordance with (5) above, when retained, will be destroyed when the forms are accomplished."

The induction officials did not give this appellant the opportunity to qualify nor did they take any of the appropriate steps prescribed by the Army Regulation. Instead, they ordered him to submit to induction in violation of their own regulations in that they had not taken the required steps to determine if he was qualified for induction.

Note that the regulation is stated in mandatory language. See especially section B (2) set forth above. That section states that registrants in the position appellant was in on March 22, 1966, "will not be inducted".

In a District Court case, the Honorable William C. Mathes had before him a defendant in the same posture as this appellant (*United States* v. *Israel Feuer,* 25778-WM, S.D. Calif.). In acquitting that defendant, the Judge said:

> "This is almost like—ethically at least—a registrant with his record who has vision that just doesn't quite meet the Army requirements, and the doctor says, 'Well, we will pass him anyway because he will refuse to be inducted and they will send him to prison for committing a felony.' There is too much that is incongruous about that. It is too much like the Communists themselves would do, if you please, in the language of the street, to set a man up to convict him of a felony." (Reporter's Transcript in #25778-WM, page 3, lines 19 through 25).

In response to the government's argument that the irregularity had not damaged that defendant, Judge Mathes said:

> "Well, it is akin to unlawful entrapment. Morally it is akin to unlawful entrapment as I view it. You are

> going to force a man into a position where you know he is going to commit a felony; whereas if you let him go the other way, he wouldn't." (Reporter's Transcript in #25778-WM, page 4, lines 10 to 16).

A defendant in a draft refusal case ordinarily is required to show that he has exhausted all of his administrative remedies or he may not mount an attack on his classification as a defense in court. It is said he is required to exhaust his administrative remedies so that the courts will not be burdened with trials that might have been avoided by the defendant's success at some stage of the administrative process which would preclude his being ordered to submit to induction. The courts have often been rather rigid on this exhaustion point, requiring that the defendant go to the brink of induction, that he complete every step of the process prior to refusing to actually enter the military.

All of the arguments that support the requirement that the defendant exhaust the administrative process apply with equal vigor to the government. Shortcuts to induction taken by the government burden the courts with cases that could have been avoided altogether, to say nothing about the inconvenience and expense to the young men involved.

For this reason, as well as for the reason that deprival of a chance to avoid the dilemma is grossly unfair to the appellant, the government should be required to exhaust the administrative opportunities for rejection that the regulations provide before forcing the registrant to induction, refusal and trial.

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant

February 9, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ
Attorney for Appellant